

11 USC § 547(b)(2)
11 USC § 547(c)(1)
antecedent debt

Hartvig v. Macadam Capital Partners, Ltd Adv No 94-3249-dds

Hartvig v. D.K.G. Services, Inc., Adv No 94-3250-dds

In re 14280 S.W. 72nd Ave., Inc. Case No 393-36593-dds7

12/19/94

DDS

Unpublished

The defendants provided professional services to the debtor which resulted in the successful acquisition of the debtor by a large competitor. Each defendant received a success fee from the closing proceeds. The chapter 7 trustee sued to recover the success fees as preferential transfers or fraudulent conveyances.

On cross motions for summary judgment, the court ruled in favor of the defendants and dismissed the cases. The defendants provided valuable services, so the debtor received adequate consideration for the transfer. The payments were not preferential because they were not "on account of an antecedent debt owed by the debtor before the transfer". The success fees were only payable if there was a sale or capital infusion. The fees were paid from the closing, so the obligation to pay and the payment occurred simultaneously.

Alternatively, if the transfers were preferential, they were a contemporaneous exchange for new value provided in the form of the successful sale and therefore not avoidable.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:	)	Bankruptcy Case No.
	)	393-36593-dds7
14280 S.W. 72ND AVE., INC.,)	
)	
<u>Debtor,</u>)	
)	
DONALD H. HARTVIG, Trustee,	)	Adversary Proceeding No.
	)	94-3249-dds
Plaintiff,)	
)	
v.)	
)	
MACADAM CAPITAL PARTNERS,)	
LTD., an Oregon corporation,)	
)	
<u>Defendant.</u>)	
)	
DONALD H. HARTVIG, Trustee,	)	Adversary Proceeding No.
	)	94-3250-dds
Plaintiff,)	
)	
v.	)	MEMORANDUM IN SUPPORT OF
	)	JUDGMENTS OF DISMISSAL
)	
D.K.G. SERVICES, INC., an)	
Oregon corporation, dba)	
Torwest Capital,)	
)	
Defendant.)	

The defendants provided professional services to assist
the debtor in its attempt to recapitalize or be sold.

Each defendant received a success fee that was payable only if the debtor obtained financing or was sold. The attempts at recapitalization were unsuccessful, and the debtor was sold to R.R. Donnelley Northwest, Inc. ("Donnelley"). As part of the closing, Macadam Capital Partners ("Macadam") received a fee of \$35,000 and DKG Services, Inc. dba Torwest Capital ("Torwest") received a fee of \$120,000. The closing and payments occurred within 90 days of the date the debtor filed its chapter 7 petition. The trustee sued the defendants to recover the payments as either preferential or fraudulent transfers.

The parties filed cross-motions for summary judgment, and at argument on December 14, 1994, all agreed to submit the complaints for decision on the merits without trial on the present record. The defendants' motions for summary judgment should be granted and the trustee's cross motions for summary judgment should be denied. My reasons follow.

The debtor was in significant financial trouble. Mr. Williams, the president, C.E.O., and majority shareholder of the debtor, hired Torwest in October 1992 to recapitalize the company or find a source of refinancing. The original agreement dated October 28, 1992 was a non-exclusive engagement which provided that Torwest would receive a success fee calculated as a percentage of the funds received by the debtor, and the stock retained by the current shareholder, or \$175,000

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if a majority of the company was sold to a party introduced by Torwest.

The original agreement was terminated, and then replaced in January 1993 with an exclusive agreement for 120 days and thereafter until terminated. Torwest's compensation under the new agreement would be measured as a percentage of the gross funds received by debtor, or \$120,000 if a majority stock interest or substantially all the assets of the debtor were sold.

The principals of Torwest spent over 2,000 hours preparing materials for investors, including various financial projections, contacting potential funding sources and making recommendations to the company. One of the recommendations was to hire a workout consultant to stabilize the company and negotiate with the company's creditors.

After that recommendation, Mr. Williams hired Macadam as a consultant. Macadam's efforts included cutting costs, instituting new internal controls and improving bidding practices. They also helped prepare the officers for meetings with potential purchasers and to respond to due diligence questions. Finally, Macadam negotiated with the debtor's creditors in an attempt to avoid bankruptcy and maximize the eventual distribution to unsecured creditors.

Macadam's Consultant Agreement was dated May 24, 1993.

It provided that Macadam would be paid \$125 per hour plus a success fee of \$35,000. The \$125 per hour was below Macadam's normal hourly rate of \$150 - \$175. The hourly fee totalled \$83,301.64. Those fees were billed and paid on a regular basis, and the trustee is not trying to avoid those payments.

The success fee was payable only under certain circumstances, including a successful merger or acquisition transaction.

The trustee included both § 547 and § 548 as a basis to avoid the payments of the success fees. Based on the affidavits provided by the parties, I find that the compensation paid to the defendants was reasonable. There is no evidence of overreaching, overcharging or that their services were not valuable. Therefore, the debtor received reasonably equivalent value in exchange for the transfers to defendants, and the fraudulent transfer claims should be dismissed.

The payment of the success fees to defendants was also not a preferential transfer as defined in § 547(b). Alternatively, the trustee may not avoid the transfers because they fall within the contemporaneous exchange defense found in § 547(c)(1).

The trustee has not established the element found in § 547(b)(2), which requires that the payments be "for or on account of an antecedent debt owed by the debtor before such

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transfer was made." The debtor did not owe the debt until the closing of the sale of the company to Donnelley, and the debt was paid simultaneously with the creation of the obligation to pay. The debt was never "antecedent", nor owing by the debtor before it was paid.

The closing of the sale was a process of preparing and signing documents, and the transfer of money from Donnelley to the debtor or its creditors. As part of the closing, and according to the terms of the sale agreement, Donnelley wired funds to the client trust account of the law firm of Davis Wright Tremaine. On the same day, Davis, Wright wrote and delivered the checks to Torwest and Macadam. The debtor did not have control over the funds once Donnelley wired them to Davis Wright. The mechanics of Davis Wright writing the check versus a direct wire transfer from Donnelley to the defendants makes no difference in the timing of the transfer from the debtor's perspective. Under these circumstances, the transfer occurred at the precise instant that the obligation became owing by the debtor. Absent a completed closing, the debtor did not owe a success fee to either defendant. The debt was not owing until Donnelley paid for the company. See In re Gold Coast Seed Co, 751 F.2d 1118 (9th Cir. 1985).

Alternatively, if the debt were found to satisfy the requirement of § 547(b)(2), the defendants have established

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that the transfers were intended by the debtor and defendants to be a contemporaneous exchange for new value given to the debtor, and therefore are not avoidable under § 547(c)(1). The debtor received new value in the form of the completed sale to Donnelley. The defendants' services were involved in creating the new value by their roles in the sale process. The transfers to defendants were at a minimum substantially contemporaneous with the receipt by the debtor of the value from the closing of the sale.

For these reasons, defendants' motions for summary judgment should be granted. By agreement of counsel, there are no material issues of fact to be tried. These are core bankruptcy proceedings as defined in 28 U.S.C. § 157(b)(2)(F) & (H), and are susceptible of final determination by this court. A separate judgment of dismissal shall be entered in each case.

DONAL D. SULLIVAN
Bankruptcy Judge

cc: Sanford R. Landress
Joseph M. VanLeuven
Charles R. Williamson
Donald H. Hartvig

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

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14280 S.W. 72ND AVE., INC.,)	
)	Adversary Proceeding No.
Debtor,)	94-3249-dds
)	
DONALD H. HARTVIG, Trustee,)	ORDER GRANTING DEFENDANT'S
	)	MOTION FOR SUMMARY JUDGMENT,
Plaintiff,	)	DENYING PLAINTIFF'S CROSS-
	)	MOTION FOR SUMMARY JUDGMENT
v.)	
)	
MACADAM CAPITAL PARTNERS,)	
LTD., an Oregon corporation,)	
)	
Defendant.)	

Based upon a separate memorandum,

IT IS ORDERED that defendant's motion for summary judgment is granted and plaintiff's cross-motion for summary judgment is denied.

DONAL D. SULLIVAN
Bankruptcy Judge

cc: Sanford R. Landress
Joseph M. VanLeuven

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

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Plaintiff,)	
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v.)	
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MACADAM CAPITAL PARTNERS,)	
LTD., an Oregon corporation,)	
)	
Defendant.)	

Based upon an order granting defendant's motion for summary judgment and denying plaintiff's cross-motion for summary judgment,

IT IS ORDERED AND ADJUDGED that this complaint is dismissed.

DONAL D. SULLIVAN
Bankruptcy Judge

cc: Sanford R. Landress
Joseph M. VanLeuven

JUDGMENT OF DISMISSAL

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:)	Bankruptcy Case No.
)	393-36593-dds7
14280 S.W. 72ND AVE., INC.,)	
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D.K.G. SERVICES, INC., an)	
Oregon corporation, dba)	
Torwest Capital,)	
)	
Defendant.)	

Based upon a separate memorandum,

IT IS ORDERED that defendant's motion for summary judgment is granted and plaintiff's cross-motion for summary judgment is denied.

DONAL D. SULLIVAN
Bankruptcy Judge

cc: Sanford R. Landress
Charles R. Williamson

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

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Oregon corporation, dba)	
Torwest Capital,)	
)	
Defendant.)	

Based upon an order granting defendant's motion for summary judgment and denying plaintiff's cross-motion for summary judgment,

IT IS ORDERED AND ADJUDGED that this complaint is dismissed.

DONAL D. SULLIVAN
Bankruptcy Judge

cc: Sanford R. Landress
Charles R. Williamson

ORDER OF DISMISSAL